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First Security Bank of Utah, N.A. v. J.B.J Feedyards, Inc. And Don Allen, dba Mt. Nebo Cattle Company : Brief of Intervenor - Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FIRST SECURITY BANK OF UTAH,
N.A.,

Plaintiff,

vs.

J. B. J. FEEDYARDS, INC., a
corporation, et al.,

Defendants.

Case No. 17,269

DON ALLEN, d/b/a MT. NEBO CATTLE
COMPANY,

Intervenors, Respondents
and Appellants,

BRIEF OF INTERVENOR - APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This is an action by Intervenors for compensatory and punitive damages against Plaintiff First Security Bank as a result of the wrongful, intentional and continuing conversion of Intervenor's business assets; commencing February 7, 1973, to and including the present time.

DISPOSITION IN LOWER COURT

The Honorable Joseph I. Dimick, sitting as a Judge
in the Fourth Judicial District Court of Utah County, without

a jury, made and entered a judgment dated July 26, 1980, as follows:

1. On February 7 and 8, 1973, without knowledge of or warning to Intervenor, First Security Bank wrongfully attached, converted and retained Intervenor's animals and assets without probable cause and with actual and legal malice towards Intervenor and his rights.
2. On June 4, 1974, in Civil No. 38,327, Judge George E. Ballif, adjudged Intervenor to be the owner of 266 head of the wrongfully attached and converted animals and ordered that the sale proceeds of the attached animals belonged to Intervenor herein in the sum of \$114,459.07, the sale proceeds of said attached animals. The issue of damages to Intervenor was expressly reserved at all times.
3. Denied, claimed damages of Intervenor of \$83,473.79 for loss of weight and profits on attached animals.
4. Ruled that claim for damages of \$29,498.78 on two checks written by J. B. J. Feedyards, Inc. and not honored by First Security Bank was outside the issues reserved for Trial.
5. Denied claimed damages of \$76,950.94 to Intervenor for loss on forced sale of Central Montana Livestock, a business of Intervenor. Held too remote and speculative and Intervenor didn't carry burden of proof.
6. Awarded Intervenor \$14,506.56 on excessive interest paid by Intervenor to Intervenor's Bank, Zions First National Bank, together with Pre-judgment interest in the sum of \$4,282.21, making a total judgment on this issue of \$18,788.77.
7. Awarded Intervenor damages for lost business, buying and selling of livestock in Montana in the principal sum of \$126,000.00, together with pre-judgment interest of \$39,574.80, making a total judgment of \$165,574.80.

8. Held that claim of damages for lost opportunity of trading transaction on future's commodity market was extremely speculative, conjectural and putting the claim completely beyond the ability of the Court to assess and award damages.
9. Awarded Intervenor damages in the sum of \$10,000.00 attorney's fees for defending against wrongful attachment, together with pre-judgment interest in the sum of \$4,200.00, making a total judgment of \$14,200.00.
10. Awarded Intervenor judgment of \$25,000.00 for damages due to anxiety, embarrassment, worry and concern, together with pre-judgment interest of \$10,775.37, making a total judgment of \$35,775.37.
11. Awarded Intervenor judgment in the sum of \$100,000.00 as punitive damages, together with pre-judgment interest thereon in the sum of \$43,101.48, making a total judgment on this issue of \$143,101.48 as a result of First Security's actions without probable cause and with actual and legal malice against Intervenor and his rights both prior and subsequent to the wrongful conversion.
12. Total judgment, \$377,440.42.

RELIEF SOUGHT ON APPEAL

At the time of the writing of this Brief, there is filed an Application for Leave to File Supersedeas Bond by First Security Bank herein. Intervenor has filed a Motion to Assess Damages for Delay in Re Application for Leave to File Supersedeas Bond. Intervenor requests this Court to assess damages for delay in payment of the judgment of the lower Court and to determine the amount of said damages.

Intervenor and Appellant seeks a reversal of the judgment of the lower Court on the following issues:

1. Failure to award Intervenor damages of \$23,929.48 for loss on attached animals.
2. Failure to award Intervenor damages of \$76,950.94 on forced sale of Central Montana Livestock Company.
3. Failure to award damages to Intervenor of \$926,608.00 for loss of opportunity of investment in the future's commodity market.

Intervenor seeks an additur to the existing judgment as follows:

1. Additional attorney's fees of \$75,795.46.
2. Additional damages for anxiety, embarrassment, worry and concern and requests an additur of an additional \$50,000.00, together with pre-judgment interest thereon.
3. Additional punitive damages of \$400,000.00; to make a total of \$500,000.00 punitive damages, together with pre-judgment interest thereon.

STATEMENT OF FACTS

Undisputed facts of this case, other than actual damages, are as follows:

- a. Since approximately 1951 Intervenor has been buying and selling livestock in the State of Montana; has been carrying on a livestock auction business in Montana under the

name of Central Montana Livestock Auction Center and bonded with the State of Montana and the U. S. Packers and Stockyards Act. (Exhibit 1, paragraphs 1-5).

b. Intervenor commenced business in Utah under the name of Mt. Nebo Cattle Company on January 1, 1973; hired Mr. Boswell as their local Utah agent and registered their brand V5 right ribs in the State of Utah on January 2, 1973. (Exhibit 1, paragraphs 14-16).

c. On January 29, 1973, Intervenor pledged his existing and after acquired cattle in Utah to Zions First National Bank for up to 200 head; the financing statement was filed with the Secretary of State of Utah on January 29, 1973, evidencing the V5 RR branded animals as security to Zions First National Bank. (Exhibit 1, paragraphs 19, 20, 21).

d. On about January 15, 1973, an inventory was taken at the J. B. J. Feedyards, in Goshen, Utah, at which time First Security Bank separated cattle by brands at said feedyard; Mr. Nebo took an inventory of its cattle, mostly bulls on January 31, 1973, branded V5 on right ribs.

e. Guards were placed by First Security Bank at J. B. J. Feedyards in Goshen, Utah about January 15, 1973, where V5 branded animals were located.

f. On February 7, 1973, without a hearing or notice of any kind to Intervenor, First Security Bank attached, levied upon the assets of Intervenor in Utah consisting of

approximately 266 head of cattle brand V5 right ribs, bank accounts and accounts receivable; and trucked Intervenor's animals to Lazy S Cattle Company Ranch. (Exhibit 1, paragraphs 22, 23, 27, 28).

g. Prior to the seeking and obtaining of the Writ of Attachment and levy by First Security Bank none of the officers or agents of First Security Bank examined the public records of the State of Utah either as to brand registration of V5 right ribs or the security agreement of Zions Bank regarding Intervenor's animals. (Exhibit 1, paragraph 29).

h. First Security Bank attached assets having a value of \$425,305.00 and had in its possession checks having a value of \$140,846.76 that had not been credited to its debtor, J. B. J. Feedyards, and when First Security Bank had advanced J. B. J. Feedyards, Inc. \$218,200.00, plus sum overdrafts. (Exhibit 1, paragraphs 23, 24, 54).

i. A security bond for attachment was filed by First Security Bank consisting of a written statement promising to pay \$10,000.00.

j. On February 9, 1973, Intervenor filed a Motion to Quash the Writ of Attachment in Civil No. 38,191. (Exhibit 1, paragraph 33). Judge Sorensen granted the Writ on April 6, 1973. (Exhibit 1, paragraph 41).

k. On April 9, 1973, the Sheriff served upon

First Security Bank, including Mr. Roy Broadbent, keeper

and agent of Bank, a demand from Intervenor to return attached V5 RR branded animals and sale proceeds of those sold, and advised them of the Order of Judge Sorensen. First Security Bank refused to comply with said demand. (Exhibit 1, paragraphs 42, 43).

1. On June 12, 1974, Judge Ballif ruled Intervenor was owner of 266 head of cattle attached by First Security Bank and branded V5 right ribs; demand for the sale proceeds of the V5 cattle was made upon First Security and they refused to return the money to Intervenor. (Exhibit 1, paragraphs 54-58).

m. The wrongfully attached V5 animals were ultimately sold for \$114,459.07. (Exhibit 1, paragraph 47).

The investment of Intervenor in his wrongfully attached assets amounted to all his liquid working capital in his Montana and Utah businesses and represented two lines of credit he had up to \$250,000.00; attached animals represented about \$200,000.00 of borrowed money. Intervenor lost his two lines of credit as a result of this wrongful conversion and attachment. (TR 69-75).

First Security Bank had either the attached animals or the sale proceeds of the animals in its possession from February 7, 1973, to May 16, 1975.

The cattle market rose faster to the highest level of recent livestock market history and during the lifetime of

Intervenor, over 50 years, during the time First Security Bank wrongfully held assets of Intervenor. (TR 80 L9-13).

The present money market certificates are presently paying the highest interest rates for many years; during the time of this appeal; the present prime rate being approximately 20% and 90-day time certificates of deposits paying approximately 16%.

First Security Bank has had the use of Intervenor's assets, including money judgment for damages, since February 7, 1973, to present, almost eight years, and has deprived Intervenor of the use of the same for said eight years.

Intervenor suffered damages as a direct result of the wrongful conversion and attachment of his assets as follows:

(A) LOSS ON ATTACHED ANIMALS

Dr. Alvin Carpenter, an expert agricultural economist and commodity market analyst, testified in support of Exhibit 16 which was received into evidence. Exhibit 16 was prepared by Dr. Carpenter from the business records of Intervenor, including the weights of the attached animals as per inventory taken before the attachment on January 21, 1973, weigh bills illustrating their weight, documents representing the sale of the attached animals, together with their weights and the price received, the feed costs and expenses, together with the market values during the time in question. He testified that there was a total loss of \$23,929.48. (TR 124-136). Mr. Garth Boswell.

an employee of Intervenor, testified as to the accuracy of the business records of Intervenor, the inventories taken, the weights of the animals, the proper feed and cost of feeding the animals and the ultimate sales, together with the average gain in weight of the animals. (TR 138-146).

(B) DAMAGES ON FORCED SALE OF CENTRAL
MONTANA LIVESTOCK COMPANY - \$76,950.94

Intervenor had been engaged in the business of a livestock auction in the State of Montana and doing business as Central Montana Livestock Company for many years prior to the wrongful conversion and attachment herein. Intervenor testified that after the wrongful conversion and attachment he was forced to sale the same because First Security Bank had his working capital tied up in the State of Utah that he had used in the Auction. The Auction cost \$176,950.94; on a forced sale he received \$100,000.00, leaving a net loss of \$76,950.94. (TR 76 L19-30).

(C) DAMAGES FOR LOST OPPORTUNITY FOR TRADING
FUTURE'S COMMODITY MARKET - \$926,608.00

Intervenor testified he committed to Mr. Bert Thurber, in the State of Montana \$10,000.00 out of his working capital wrongfully converted and attached in the State of Utah that he expected to receive back momentarily right after the attachment, for the purpose of investing in the Commodity Future's Market for livestock. (TR 57 L19; TR 60 L3-9). Mr. Bert Thurber worked for D. A. Davidson Company who traded in

Commodity Future's Market for livestock. Intervenor was to invest \$10,000.00 in cattle future when Intervenor's money was released from Utah. (TR 111 L9-13). Mr. Thurber accepted the oral offer and based upon getting the money from Utah. (TR 116 L20-23). Mr. Wilhelmi was the account executive for the livestock future's commodity investment. (TR 190 L6). Intervenor stated to Mr. Thurber that Intervenor would buy long and sell short because he wanted to be on the down side of the market. (TR 352 L30; TR 353 L1-3).

Dr. Alvin Carpenter, a commodity futures expert, identified and testified to Exhibit A-19, a graph showing cattle futures from 1972 to 1976. The graph illustrates and Dr. Carpenter testified to a \$10,000.00 investment in contracts of cattle August futures on February 9, and bought back and sold on the market on August 14, at a much higher price per hundred weight (TR 177 L24-27). That these August futures contracts would have been purchased on February 9, at price of \$42.05 per hundred weight. During the rapid rise in cattle futures that happened between February 9, 1973, and August 14, 1973, the price rose to \$59.50 per hundred weight. (TR 177 L14-19). That this made a profit of \$17.45 per hundred weight and a total profit of \$83,280.00 on the original \$10,000.00 investment on the upswing of the market. (TR 177 L19-27).

The cattle market for futures had been rising very rapidly, on August 14, 1973, take a longer time position, a sell short position on the downswing of the market in Transaction II on Exhibit A-19, and sell April futures on August 14, 1973, when the price of April futures was \$61.07 per hundred weight. Those April futures purchased August 14, 1973, dropped to \$41.00 per hundred weight. The April futures held until April 14, 1974, on August 14, 1973, the profit of \$83,280.00 plus the original \$10,000.00, a total of \$93,280.00 would have then been invested in April futures. This would have controlled 116 contracts from August 14, 1973, to April 1, 1974, on April 1, 1974, buy back those futures. This would make a profit of \$926,608.00 (TR 178 L14-30).

From August 14, 1973 to April 1, 1974, a futures contract is the equivalent of 40,000 pounds of live steers. (TR 179 L2-7).

Commodity futures on grain has been in existence since 1848. Cattle contracts began on the Chicago Mercantile Exchange in 1964 and has been very active even since then. (TR 179 L14-19).

In commodity futures market with a minimum margin down payment, you can control that whole resource (commodity) throughout the life of the contract. This makes it attractive to go into this market because of leverage. You can't do this on the stock market, on a rapidly rising market and on a

downswing market, you can sell futures at the high price and buy them back at a low price and make a lot of money. This is not so on the stock market. (TR 180 L1-11).

These cattle contracts mature in April of each year. August and April are the standard trading deadlines. You take one position and rapidly rising market and another position on downward swing of the market. (TR 180 L12-30).

A large amount of money is made because of the leverage and the change of positions you can take, depending on the market. The contracts are dated for August and April of each year for buying, selling and delivery of animals. (TR 180).

A commodity futures contract was defined as a firm commitment to accept or make delivery of a commodity during some specified month in the future; the terms of agreement and geographic points of delivery are designated; it is not mandatory that you make delivery or accept delivery; it is a forward pricing mechanism; a majority of the cases are settled by an offsetting transaction in the futures market. (TR 174 L16-28).

Dr. Carpenter further testified that Intervenor could have earned several times the profit in the years the balance of 1974, 1975 and into 1976. (TR 193, 194 195). Exhibit A-23, received by the Court, illustrates and as testified to by Dr. Carpenter the price of slaughter bulls

at Central Montana Livestock Auction, 1973 to 1974 in Lewiston, Montana. Exhibit A-24, testified to by Dr. Carpenter, illustrates cattle prices quoted from Omaha, Nebraska, and Kansas City, Kansas during the period of 1973 to and including 1975. This Exhibit, as verified by Dr. Carpenter, illustrates that the prices rose higher and faster many years in the year 1973 and in the fall of the 1973. The cattle futures market operates opposite to the actual market.

Exhibit A-19 illustrates that the same type of investments could have been made in the years 1974, 1975 and 1976. The only year that was used for this purpose was from February of 1973, to and including April, 1974. Exhibit A-20, received into evidence, explains the calculation and the amount of lost profit on the future's transaction. Dr. Carpenter testified in support of both Exhibits A-19 and A-20. Exhibit A-20 demonstrates that 12 contracts would have been involved in transaction I, the upswing of the market, and 116 contracts would have been involved on the downswing of the market in April, 1974. A close inspection of Exhibit A-19 reflects that the buying in February, 1973, was not at the lowest prices and that the selling in April, 1974, was not at the point of highest profitability, to-wit: the lowest part of the downward trend at that time.

(D) LOST BUSINESS OPPORTUNITIES IN
TRADING LIVESTOCK IN MONTANA

Dr. Carpenter prepared and testified to Exhibit A-7, a chart summarizing Intervenor's lost livestock sales in Montana for the years 1973, 1974 and 1975 when the sale proceeds of the V5 animals were ruled they belonged to Intervenor. Exhibit A-7 demonstrates that Intervenor lost the sale of 83,717 head, a conservative profit of \$8.00 per head and for a total sum of \$669,736.00. (TR 202, 337). It was prepared from business records of Intervenor. A-21 which contained information on buying and selling livestock and financial statements. A-7 represents gross profits and must be read with A-21, the U.S. Packers and Stockyard reports of Intervenor to arrive at net profit. Even though Intervenor had been in this business for over 25 years and showed a steady increase each year to 1972, the calculation of \$669,736.00 does not project any increase in sales for years 1973, 1974 and 1975. The records show profits ranging from \$1.00 to \$100.00 per head, a conservative \$8.00 per head was used. (TR 202-204).

Intervenor testified he did not show a net profit of \$372,000.00 in 1972 nor \$176,424.00 in 1973; that he had many other expenses in other businesses, expenses offsetting the buying and selling of livestock; that \$8.00 per head was conservative gross profit. (TR 348-351; 337).

(E) DAMAGES DUE TO ANXIETY, EMBARRASSMENT,
WORRY AND CONCERN

Intervenor testified the unlawful conversion caused severe emotional impact upon his wife and himself. That they were fearful of losing everything they had acquired during his lifetime; that all of his liquid working capital was tied up, that he lost two lines of credit with Montana banks totaling \$250,000.00; that as a result of capital being tied up, he couldn't carry on his ranching, livestock auction, buying and selling business in Utah and Montana; that he was stunned, six years of sleepless nights couldn't pay his debts, he had some machinery foreclosures and has nearly lost his home, ranch, and all businesses. That he was a bishop in a small community and couldn't fulfill his family objectives of church missions and educational assistance to his children. (TR 97, 98, 99).

Mrs. Allen, Intervenor, testified they had always had excellent credit with their financial institutions, had never had any trouble timely meeting their obligations; had no problems borrowing; took out second mortgages to prevent their home, ranch and everything from being foreclosed upon; that they have borrowed from his father to pay interest only to prevent foreclosure on home and ranch; that she was active in the businesses and banking, etc.; that they suffered extreme embarrassment from neighbors and financial institutions; that

they couldn't timely pay utilities and current living and business expenses and had to go on a daily cash basis. That she became extremely scared and her emotions would go from one extreme to another. That she was scared of this large national bank that had so much money and power, including their money; that it was humiliating, embarrassing and painful in every way and sleepless nights for she and her husband. (TR 360-365).

(F) ATTORNEY'S FEES

Thomas S. Taylor, Attorney for Intervenor, testified as to the number of hours that he had spent for presenting the Intervenor from February 3, 1973 to the time of the trial of this matter on damages before Judge Dimick; that in his opinion \$100.00 per hour was a reasonable amount for trial time; that out of Court time amounted to 753.25 hours and that \$75.00 per hour based upon the complexity and difficulty of the case was reasonable; that trial time amounted to \$10,750.00, out of Court time at \$56,493.75 and had incurred expenses of \$1,417.46; that Intervenor had incurred an expense of \$,000.00 to Mr. Dave McMullin in the foreclosure of Zions Bank in determining the ownership of the wrongfully attached animals. That the total attorney's fees, based upon time was \$77,420.46. Exhibit A-40, a statement of time and charges from counsel to Intervenor was received into evidence which described the dates, type of work and the time consumed.

Judge Dimick excluded and sustained an objection to the \$4,000.00 cost of Mr. McMullin in representing Zions First National Bank in the trial involved on the ownership of the animals.

(G) PUNITIVE DAMAGES

Bank witness Bill Ford testified Fords and bank, before the wrongful conversion, did not know who the V5 right rib branded animals belonged to; that he and the bank, before conversion, sent letters to all customers of Intervenor dated January 26, 1973, that all checks on V5 branded animals were to be paid to bank (Exhibit A-30); that no conversations or efforts were made to determine ownership of V5 brand before conversion on February 7, 1973. (TR 397-400).

Bank witness, Dr. Grant Jensen, a veterinarian, confirmed that when you move cattle you cause them stress; that it is important to bring cattle back carefully after a change of feed. (TR 422-424).

Bank witness Leon Christmas, manager of Lazy S Cattle Company Ranch (where attached cattle were moved to by bank), stated Mr. Hansen, officer of bank, stated to him V5 cattle delivered to him belonged to bank's debtor, J. B. J. Feedyards, Inc. (TR 449 L29-30).

On about January 15, 1972, First Security Bank hired and posted guards at J. B. J. Feedyards where Intervenor's cattle were waiting to be sold. One of the guards

was Bank witness Sherman Jones. He testified he kept records on movement of cattle from J. B. J. Feedyard and names and license plates of people who came and left; that the cattle were fed twice a day and feed was brought into feedyard; that First Security Bank told him "there is a disagreement in money and inventory - we want you to watch everything that goes on here and keep a record of it."; that he had no instructions to find out who the owners of the V5 cattle and he helped to feed the cattle. (TR 454-467).

Bank witness Jud Harward was an employee of bank. He testified V5 cattle were older bulls, culled out of herds, and in poor health primarily because of their age; that no V5 brand was on the bank's agreements with Fords and J. B. J. Feedyard, Inc., debtors of bank; that the bank made appraisal of cattle and took inventory January 6, 1973, and January 16, 1973; that "we sorted the cattle into different pens by ownership type arrangements"; that at this time bank didn't know who V5 branded cattle belonged to. (TR 477-481).

Exhibit A-62, an Affidavit of an assumed name was filed February 9, 1973, in Secretary of State of Utah office disclosing Intervenor was doing business in Utah under name of Mt. Nebo Cattle Company.

Exhibit A-38 is an Affidavit filed with Utah County Court in an action related to Defendant J. B. J. Feedyards, Inc., herein, that First Security Bank was involved in and

aware of; that Exhibit A-30, the letter to Intervenor's customers demanding payment to the bank, is attached to this Affidavit. Paragraph 4 of the Affidavit states all V5 branded cattle belonged to Intervenor herein. Exhibit A-38 is dated January 29, 1973, before wrongful conversion.

Bank witness Roy Broadbent, an officer of First Security Bank, testified the bank was not aware of who claimed ownership in the V5 branded cattle (TR 524); that the "bull program" Intervenor was engaged in turned the bulls over for sale from one to four weeks after their arrival, a fast turnover; that the bulls were old and worn out. (TR 545). He testified THE BANK INTENTIONALLY ATTACHED THE V5 BRANDED ANIMALS AND PLANNED TO DO SO ON ABOUT JANUARY 25, 1973 (TR 545); that the bank received brand information early in January, 1973, under the name of Mt. Nebo Cattle Company (TR 558); that the bank advised no one of the pending attachment (TR 560); that he may have had telephone conversations (that Intervenor testified to) with Intervenor about payment of bulls in September or October, 1972 (TR 560); he recalled a conversation (that Intervenor testified to) in the courtroom on February 9, 1973, with Intervenor in which Intervenor told him the V5 cattle belonged to Intervenor and that the bank had made a mistake on the ownership of the V5 cattle and that if the bank would release his V5 branded cattle, Intervenor would forget this wrong act, including damages (TR 566). To that

conversation Mr. Broadbent's response was: "WELL, I THOUGHT HE WAS TOTALLY WRONG AND I STILL DO." (TR 566 L27).

Garth Boswell testified he told Mr. Broadbent that the V5 branded cattle belonged to Intervenor, prior to the wrongful conversion (TR 262 L14-28); that he continually told the bank's guards tha the V5 branded cattle belonged to Intervenor and not the bank, all before February 7, 1973. (TR 263 L23-25).

Exhibit A-14 represents a stipulation entered into between the parties and dated February 21, 1973, that permitted Intervenor to liquidate and timely sell the V5 cattle and minimize his damages. He signed A-14 because the bank's appraisals on the V5 cattle was between \$70,000.00 and \$80,000.00 (when the true value was \$140,000.00 if properly fed and sold) and that Intervenor was fearful the bank would sell them for less than their true value (TR 321 L8-19).

Exhibit A-27, dated April 10, 1973, after the Stipulation, is another incident where the bank "ran" with 100 head of Intervenor's cattle; without his knowledge or consent; illegally divided the load after brand inspection, and flooded the market place at Producer's Livestock Auction in North Salt Lake City; this drove the price down because too many bulls were "dumped" onto the market. Again, all without authority or the right to do so.

First Security Bank presently has an application before this Court for a Supersedeas Bond for this appeal and suggests to this Court that interest should be considered on the money judgment of Intervenor at 8% simple interest. This bank is presently paying 16% interest on its 90 day time certificates of deposit and is charging approximately 30% prime rate to its prime customers. This is another continuing wrongful conversion of Intervenor's assets - into the eighth year.

A R G U M E N T

POINT I

TRIAL COURT ERRED IN FAILING
TO AWARD INTERVENOR DAMAGES
ON LOSS OF ATTACHED ANIMALS

One fact that is not controverted by any of the witnesses before the Court was to the effect that when you move animals they are put under stress, particularly when they are crowded. This is confirmed by Mr. Boswell, an experienced livestock man, Intervenor, an experienced livestock man, and Dr. Grant Jensen, a veterinarian called by the Defendant. Both Dr. Jensen and Mr. Boswell testified that when animals are changed in their feed and feeding habits they have to be brought back very carefully with the appropriate feed. The testimony was uncontroverted that the feed furnished by First Security Bank was merely a maintenance

ration and not a gaining ration. Between the loss in weight on the animals as a result of the move, sometimes called "shrink" and the failure to adequately feed them so that they could gain weight, it is uncontroverted that the wrongfully converted and attached V5 branded animals were not sold for the value that they should have been sold for and that they couldn't be sold within one week to 30 days after they arrived for purposes of sale in the State of Utah as originally designed. Intervenor attempted to mitigate his damages by agreeing to sell the animals as in his judgment he determined they would be ready for sale and without flooding the market. There is a limited market for these bulls and this was graphically demonstrated when the Bank wrongfully took 100 head of animals, some of them to Producer's Auction in North Salt Lake and the balance to E. A. Miller near Hyrum, Utah. Based upon the sale proceeds of the animals, the weights and inventory prior to the attachment and moving, the average gain of weight of \$3.00 per head, all on just the 214 head of bulls, not the 52 other head belonging to Intervenor that the damages to Intervenor, after feed costs and expenses, is the sum of \$23,929.48.

This is a direct and proximate result of the wrongful conversion and attachment by the Bank of Intervenor's animals. It is not speculative and was proven by a preponderance of the evidence.

One of the axioms of the law has been and still is
"YOU ATTACK AT YOUR PERIL".

In Gould vs. Mountain States Tel. & Tel., 6 Utah 2nd
187, 3 P2d 802, this Court ruled as follows:

"Where property attached was a stock of
merchandise kept for sale, recovery may be
had not only for the value of the goods,
but for loss of profits."

It is clear from the above that Intervenor's loss of profit,
the shrink and failure to gain at 3 pounds per day is clearly
a loss of profit all as computed by Dr. Carpenter as herein
stated and on a very conservative basis.

In Stewart vs. Hansen, 62 Utah 281, 218 P2d 959,
44 ALR 340, this Court ruled as follows:

"To award damages for loss of profits, it
must be made to appear that the business had
been a successful operation for such a period
of time as to give it permanency, and recog-
nition, and that said business was earning a
profit which could be reasonable ascertained
and approximated."

In Jenkins vs. Morgan, 123 Utah 480, 260 P2d 532, this
Court ruled as follows:

"An element of uncertainty as to amount of
damage is not a barr to recovery."

In Peterson vs. Cache County Drainage District, 77 Utah 256,
294 P 289, this Court ruled as follows:

"The uncertainty which prevents recovery of loss of profits is the uncertainty of the fact of damage and not as to its amount, where it is reasonably certain that damage has resulted, near uncertainty as to amount will not preclude right of recovery."

In Dee vs. San Pedro and S. L. R. Company, 50 Utah 167, 167 P 246, this Court ruled as follows:

"Damage to business need only be approved with sufficient certainty that reasonable minds might believe from preponderance of evidence that damage was actually suffered in order to permit award of damages."

In Howarth vs. Ostergaard, Utah, 1973, 515 P2d 442, this Court ruled as follows:

"Proof of loss of profits must not be completely speculative nor uncertain as to fact of damage although uncertainty is permissible as to measure or extent."

It is clear from the above cases that in summary the State of Utah holds that if a business loss is proven to a reasonable certainty from a preponderance of the evidence, THAT UNCERTAINTY AS TO AMOUNT OF LOSS IS NOT A BARR TO RECOVERY OF THE LOSS AND THAT UNCERTAINTY IS PERMISSIBLE AS TO MEASURE OR EXTENT.

Intervenor is entitled to damages in this category in the sum of \$23,929.48.

POINT II

TRIAL COURT ERRED IN FAILING
TO AWARD DAMAGES ON LOSS OF
FORCED SALE OF CENTRAL
MONTANA LIVESTOCK COMPANY

One of the several businesses that Intervenor had in the State of Montana was the Central Montana Livestock Company, a corporation, operating near Lewiston, Montana. Mr. Allen had been in this business for many years and it was a licensed and bonded livestock auction. The testimony is uncontroverted that his two lines of credit with the Montana Banks in the total sum of approximately \$250,000.00 have been destroyed as a result of his inability to service his debt and by reason of the vast majority of his working capital being tied up by First Security Bank in the wrongful conversion and attachment of his animals and assets in the State of Utah as if he was forced to sale the business at a loss of \$76,950.94. This evidence is uncontroverted in the record before this Court.

Again, First Security Bank attached at its peril and must be held directly repsonsible for all of the damages sustained by Intervenor, including this element of compensatory damage.

POINT III

LOST BUSINESS OPPORTUNITIES
IN TRADING LIVESTOCK IN MONTANA

The following evidence is uncontroverted; that Intervenor was an established and experienced trader for over 25 years; that he had increased his trading each year until 1973, year of the conversion; in 1973 he traded one-half (1/2) of 1972; in 1974 he traded 20% less than 1973; in 1975 he traded 28% less than 1974. Exhibit A-7 eliminates any projected trade increases that Intervenor had in prior years; proves he lost trades of 83,717 head at a conservative gross profit of \$8.00 per head during the profitable livestock market for a gross loss of \$669,736.00. Exhibit A-21 discloses that expenses of feed and transportation, not fixed expenses covered by other businesses, amounted to approximately 30% of the gross profit. The lost net profit is as follows:

Gross Loss - Exhibit A-7	\$669,736.00
Less 30% expense - Exhibit A-21	- 200,920.80
Net Profit Lost	<u>\$468,815.20</u>
Add pre-judgment interest	210,966.84
Total loss	<u><u>\$679,782.04</u></u>

This is not speculation as to either the fact of damage or the amount of the damage. The lower Court awarded \$126,000.00, plus pre-judgment interest of \$39,574.80, for a total of \$165,574.80. Full justice requires an additur of \$514,207.24.

POINT IV

TRIAL COURT ERRED IN FAILING TO AWARD
INTERVENOR DAMAGES FOR LOST OPPORTUNITY
OF INTERVENOR FOR TRADING TRANSACTION
AND PLAN IN THE FUTURE'S COMMODITY MARKET

Prior to the wrongful conversion, Intervenor entered into a commitment to invest \$10,000.00 with D. A. Davidson Company, and its expert, in the cattle futures commodity market. The expert was to perform the investment and the transactions. The invest was to be about February 9, 1973, right after First Security Bank released their wrongful attachment of his cattle, which he expected shortly. The plan was to buy short and sell long and be on both the rapid rise in the market and on the downside of the market. It was an investment to be handled by an expert.

Dr. Carpenter, an expert, proved what an expert would do; invest \$10,000.00 on February 9, 1973 in August futures; for the rapid rise in the market; then take a different position in the market for the downswing of the market. By reinvesting the original investment, plus the profit on transaction I and through leverage into the April futures in transaction II the profit would be \$926,608.00. This large profit was the result of the market during that time.

The Utah authorities citec herein clearly hold that the criteria is damage, not the amount of the damage that cannot be too speculative. This lost investment meets the

legal requirements of reasonable certainty of the damage; the amount of damage is conservative from the expert investor in that it was for one year only, not two or three, and the transactions were not computed at the extreme high or low points of the market at that time.

The lower Court erred in holding this investment as speculative and conjunctural and "putting this claim completely beyond the ability of the Court to assess and award damages." The reasonable and uncontroverted evidence has established the damage at \$926,608.00. No authority prohibits recovery for damage due to loss of this type of an investment.

POINT V

TRIAL COURT ERRED IN FAILING TO
AWARD SUFFICIENT ATTORNEY'S FEES;
ADDITUR REQUESTED AND JUSTIFIED

Counsel for Intervenor testified as to the time, work, and value of his attorney's fees in the sum of \$77,420.46. The only objection as to the amount was \$4,000.00 to Mr. Dave McMullin, attorney for Zions Bank, charged to Intervenor. Exhibit A-40 documented the time, work and expenses.

In Pacific Coast Title Insurance Company vs. Hartford Accident and Indemnity Company, 7 Utah 2nd 377, 325 P2d 906, this Court held attorney fees should be treated as the legal consequences of the original wrongful act and may be recovered as damages.

The bank has created the necessity for this expense to Intervenor by reason of the bank's intentional and wrongful conduct.

This Court should make an additur of \$67,420.46.

POINT VI

TRIAL COURT'S AWARD OF DAMAGES DUE TO
ANXIETY, EMBARRASSMENT, WORRY AND CONCERN
IS INADEQUATE; ADDITUR IS REQUESTED AND JUSTIFIED

Intervenors live in a small community in Fairfield, Montana. They have lived there for many years and raised a large family, about six children. They have been active in business, community and religious affairs and are well known. As a bishop, Mr. Allen was well respected and they had developed excellent credit for their inter-related and several businesses, including the buying and selling of livestock, ranching, and livestock auction.

The collapse of their open line of credit in the Montana and Utah banks was caused by the wrongful conversion of Intervenor's assets in Utah. These Utah assets represented the liquid working capital.

Intervenors suffered humiliation in their small community when they could not pay their bills; the resultant foreclosures and near loss of their home, their ranch and everything they had accumulated in their lifetimes. They have suffered years of sleepless nights, have worried about

being able to provide for their children; and suffered anxiety over not only loss of business, but what they could have achieved in the most profitable era of the livestock business in many years. All of this is compounded when it is intentionally done by a large, powerful national bank.

In Jeppen vs. Jensen, 47 Utah 536, this Court held that where wrongful acts were shown to be willful, recovery for mental pain and suffering is permitted, even though no bodily injury is inflicted and none is intended.

In Hawaii, Franco vs. Fujimoto, 47 Hawaii 408, 390 P2d 740, it is held that the proper test for determining damages for mental anguish is the intensity and extent thereof as disclosed by the evidence.

In 25 C.J.S. 997, Sec. 94, Damages, Mental Pain and Suffering, it states that the amount is in the sound discretion of the trier of the facts; may be substantial; all in light of the relevant facts.

See Restatement of Torts 2nd, Section 46, for explanation as to when it is recoverable as damage and entitlement of outrage, emotional stress.

See 28 ALR 2nd 1091, Sec. 7, where it states that where there has been a willful trespass, malice or insult, regarding interference with or injury to chattels, damages may be awarded for mental disturbance.

See Deeby vs. Tossi, Calif. 130 P2d 39, and Hyde vs. Southern Grocery Stores, 197 S.C. 263, 15 SE 2nd 353, where they awarded damages for mental distress in actions for wrongful attachment or seizure, without any showing of malice or ill-will on Defendant's part.

The evidence justifies an additur to the lower Court's award of \$25,000.00, plus pre-judgment interest of \$10,775.37 or total of \$37,775.37.

The additur should be the sum of \$50,000.00, plus pre-judgment interest of \$22,500.00 (6% for 7.5 years) for a total additur of \$72,500.00.

POINT VII

THE TRIAL COURT'S AWARD ON PUNITIVE DAMAGES IS INADEQUATE AND AN ADDITUR SHOULD BE MADE AND IS JUSTIFIED

This Court has recently reaffirmed that the purpose of punitive damages is to punish the wrong-doer, to deter him from similar acts in the future and to warn others that such conduct will not be tolerated.

The unequivocal facts of this case are as follows:

- a. This bank has completely and intentionally disregarded Intervenor's rights to his property.
- b. There was no justification for converting Intervenor's property.

c. The intentional and malicious acts are continuous and have been repeated for almost eight years.

d. That this bank has profited from its wrongful acts by retaining Intervenor's assets and money for eight years in its bank.

How do you punish and deter a large and powerful national bank that has assets of 2.18 billion dollars? You do so by taking back a substantial amount of money. The issue we have is what a substantial amount of money is, so far as this bank is concerned; not what is a substantial amount to the average person or to the Intervenor.

Some of the uncontroverted facts are as follows:

- A. Intervenor's cattle had his brand; evidence of his ownership.
- B. The Bank was told that Intervenor was the owner before the conversion and continuously for the past eight years.
- C. In February, 1973, Intervenor offered to forget the conversion if the bank would then return his property; bank refused.
- D. Multiple demands for return of Intervenor's property have been refused by bank.
- E. No hearing or warning to Intervenor about attachment before it aquired.
- F. Bank had excessive security for their protection; not Intervenor's property.
- G. Bank had actual and constructive knowledge that Intervenor was owner of V5 cattle; Finance agreement of Zions Bank on V5 cattle

in Secretary of State of Utah; Brand Inspector office, State of Utah.

- H. April 10, 1973, Bank, without authority and in violation of agreement with Intervenor "ran" with 100 head of V5 cattle and "dumped" them on the market; all done contrary to law.
- I. Intervenor's credit destroyed and loss of business.

One of the most significant facts to justify substantial punitive damages was the testimony of Mr. Broadbent, officer of First Security Bank, when he was told by Intervenor in February, 1973, that Intervenor was the owner of the V5 cattle and asked to return them, he testified as follows:

"Well, I thought he was totally wrong and I still do."

"This means that the bank then would be short 392 head of cattle plus 266 head of cattle and no accounting for any of them."

During the trial on the issue of ownership of V5 cattle before Judge Ballif, Intervenor's accountant proved that First Security Bank was not short on its own accounting.

This bank has done nothing for eight years to mitigate these damages. It compounds the damages to Intervenor by retaining the money judgment of the lower Court by earning approximately 20% interest and suggests it pay 8% when the bank itself is paying 16% on 90-day time certificates of deposit.

Exhibit 1, paragraphs 64, 65 and 66 reflect this Bank has a reserve of nearly \$12,000,000.00 for losses; this is one of those losses, that it and its subsidiaries have combined resources of 2.18 billion dollars.

In Terry vs. ZCMI, Utah, 1979, 605 P2d 314, this Court ruled as follows:

"Purpose of punitive or exemplary damages award is not to compensate party harmed, but rather to punish wrong-doer, to deter him from similar acts in future and to provide fair warning to others similarly situated that such conduct will not be tolerated."

"While amount of compensatory damages awarded is one factor in determining appropriate measure of punitive damages, it is not the exclusive one."

"With respect to award of punitive damages, jury in its original decision or a Court in review of that decision must consider particular nature of Defendant's acts, probability of those acts being repeated in future, and relative wealth of particular Defendant."

In Wilson vs. Oldroyd, Utah, 1954, 267 P2d 759, this Court ruled as follows:

"Punitive damages are awarded on theory that it is permissible in case of certain aggravated wrongs to permit the private ligigant in public interest to impose a penalty upon Defendant as a punishment and to deter others from engaging in similar offenses."

"Punitive damages must fall within limits of reason, must not be so disproportionate to injury and actual damage as to plainly manifest that they were the result of passion and prejudice and must be correlated with other facts and circumstances, and underlined including Defendant's wealth."

"It is proper to receive evidence and consider wealth of Defendant as bearing upon the issue of punitive damages."

See also, Evans vs. Gaisford, Utah, 1952, 247

P2d 431.

In 52 AmJur 2nd 163, Malice, Section 2, it states as follows:

"The law presumes, when a wrongful and injurious act is willfully done, that the wrongdoer was actuated by malicious motives. Malice may also be inferred from a reckless disregard of the rights of others."

In 22 AmJur 2nd 117, Damages, Sections 82, 249, 250 it states "intent and motive may be proved by words and conduct.

In 52 AmJur 2nd 163, Malice, Section 1:

"Express malice consists where a wrongful act is done with a sedate and deliberate mind and form of design. Implied malice is defined as that which the law infers or imputes to certain acts."

The lower Court correctly found that this bank "refused to acknowledge said animals and the sale proceeds thereof as belonging to Intervenor. That said wrongful conversion and retention of Intervenor's animals and assets was performed without probable cause AND WITH ACTUAL AND LEGAL MALICE TOWARDS INTERVENOR AND HIS RIGHTS." The evidence strongly supports this finding of the lower Court.

The only way to punish this bank is to strike it in its pocket book. The amount must be such that it is substantial and related to its ability to pay. It must be a substantial amount to a 2.18 billion dollar bank who has a present \$12,000,000.00 reserve for this purpose. The present award of \$100,000.00 plus pre-judgment interest of \$43,101.48 (6% interest for 7.5 years) is not substantial to the ability to pay and is not a deterrent to this bank or others.

This Court is strongly urged to make an additur of \$400,000.00 plus pre-judgment interest at 6% for 7.5 years in the sum of \$180,000.00, or a total additur of \$580,000.00. Even this amount is insignificant to the \$12,000,000.00 reserve of the bank set up by it for these losses.

C O N C L U S I O N

The record strongly supports that lower Court in finding First Security Bank wrongfully converted the assets of Intervenor; commencing February 7, 1973, to and including the present time. That the bank has done so without probable cause and with actual and legal malice towards Intervenor and his rights. As a direct proximate cause, Intervenor has been damaged as follows:

a. This Court should reverse the lower Court and award Intervenor \$23,929.48 damages for loss on the attached cattle.

b. Reverse the lower Court and award Intervenor damages of \$76,950.94 for a forced sale of his business known as the Central Montana Livestock Company.

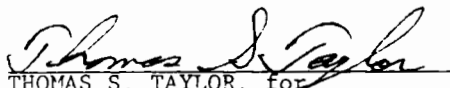
c. Reverse the lower Court and award Intervenor damages of \$926,608.00 for loss of investment into the Commodity Futures Market.

d. Award Intervenor an additur of \$67,420.46 for attorney's fees to the award of the lower Court of \$14,200.00.

e. Award Intervenor additur of \$50,000.00, together with pre-judgment interest of \$22,500.00 or a total additur of \$72,500.00 to the lower Court judgment of \$35,775.37 for anxiety, embarrassment, worry and concern.

f. Award an additur of \$400,000.00, plus pre-judgment interest of \$180,000.00, for a total additur of \$580,000.00 to the lower Court judgment of \$143,101.48 as punitive damages.

Respectfully submitted this 16th day of January, 1981.


THOMAS S. TAYLOR, for
CHRISTENSEN, TAYLOR & MOODY
Attorneys for Intervenor -
Appellant
P.O. Box 1466
Provo, Utah 84601

CERTIFICATE OF MAILING

This is to certify that two true and exact copies of the foregoing Brief for Intervenor - Appellant were mailed to Mr. Don B. Allen, for Ray, Quinney & Nebeker, Attorneys for Plaintiff-Respondent First Security Bank to his office located at 400 Deseret Building, Salt Lake City, Utah 84111, postage prepaid this 16th day of January, 1981.


THOMAS S. TAYLOR, Attorney